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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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CLERK
N. Seguin

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DECLARE A.R.S. §§ 13-4431
AND 4433(B)-(E) AND ARIZONA RULE
OF CRIMINAL PROCEDURE 39(b)11
UNCONSTITUTIONAL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Motion to Declare A.R.S. §§ 13-4431 and 4433(b)-(e) and Arizona Rule of Criminal Procedure 39(b)11 Unconstitutional and requests that Defendant's Motion be denied. The State of Arizona's Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On October 29, 2008, Charlotte DeMocker told the Yavapai County Victim Advocate that she wanted contact with Defendant, her father, and did not require the services of a victim advocate. The advocate explained to Charlotte that she could request contact with Defendant without "opting out," or waiving her victims' right. Charlotte reiterated that she did not require

1 the assistance of Victim Service. On October 30, 2008, Katie sent an email to Victim Services
2 indicating that she too was "opting out."

3 **LEGAL ARGUMENT:**

4 The Victims' Bill of Rights, Ariz. Const. art. II, § 2.1, (hereinafter VBR) was
5 approved by the Arizona voters during the fall election of 1990. It became effective
6 November 26, 1990. "Paragraphs one through nine of the VBR not only create rights, but
7 create rights unique and peculiar to crime victims." *State ex rel. Napolitano v. Brown*, 194
8 Ariz. 340, 343, 982 P.2d 815, 818 (1999).

9 These nine paragraphs of the VBR provide that a victim of a crime has a right:

- 10 1. To be treated with fairness, respect, and dignity, and to be free from intimidation,
11 harassment, or abuse, throughout the criminal justice process.
- 12 2. To be informed, upon request, when the accused or convicted person is released
13 from custody or has escaped.
- 14 3. To be present at and, upon request, to be informed of all criminal proceedings
15 where the defendant has a right to be present.
- 16 4. To be heard at any proceeding involving a post-arrest release decision, a negotiated
17 plea, and sentencing.
- 18 5. To refuse an interview, deposition, or other discovery request by the defendant, the
19 defendant's attorney, or other person acting on behalf of the defendant.
- 20 6. To confer with the prosecution, after the crime against the victim has been charged,
21 before trial or before any disposition of the case and to be informed of the
22 disposition.
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- 1 7. To read pre-sentence reports relating to the crime against the victim when they are
- 2 available to the defendant.
- 3 8. To receive prompt restitution from the person or persons convicted of the criminal
- 4 conduct that caused the victim's loss or injury.
- 5 9. To be heard at any post-conviction release from confinement is being considered.

6 Ariz. Const. art. II, Section 2.1(A)(1)-(9).

7 In *Brown*, the Arizona Supreme Court "concluded that the rulemaking power of the

8 legislature granted by the VBR extends only to those 'procedural rules pertaining to victims

9 and not with the substantive general subject of the rulemaking power,'" and "that the

10 legislative rulemaking power under the VBR 'extends only as far as necessary to protect

11 rights *created by* the [VBR] and not beyond.'" *Id.* (citations omitted)(emphasis in original).

12 "[T]he scope of legislative rulemaking power under the VBR extends to those rules that

13 define, implement, preserve, and protect the specific rights unique and peculiar to crime

14 victims, as guaranteed and created by the VBR. *Id.* The statutes in Chapter 40 of Title 13 of

15 the Arizona Revised Statutes are the procedural rules enacted by the Arizona legislature with

16 those goals in mind. *Ariz. R. Crim. P.*, Rule 39 mirrors the VBR and its statutory progeny.

17 The State does not "represent" the victim as a client. In *State ex rel. Romley v.*

18 *Superior Court [Wilkinson]*, 181 Ariz. 378, 891 P.2d 246 (App. 1995), the Court of Appeals

19 recognized that the Victims' Bill of Rights imposed additional statutory duties on the

20 prosecution, but stated, "the rule is well established that a prosecutor does not 'represent' the

21 victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor." *Id.* at 382,

22 891 P.2d at 250. The Court reasoned that a defense attorney's responsibility is primarily

23 towards the defendant, but the prosecutor's duty is to the State, representing society as a

1 whole. The prosecutor's "duty is to see that justice is done on behalf of both the victim and
2 the defendants":

3 The prosecutor . . . enters a courtroom to speak for the People
4 and not just some of the People. The prosecutor speaks not
5 solely for the victim, or the police, or those who support them,
6 but for all the People. That body of "The People" includes the
7 defendant and his family and those who care about him. It also
8 includes the vast majority of citizens who know nothing about
9 a particular case, but who give over to the prosecutor the
10 authority to seek a just result in their name.

11 *State ex rel. Romley v. Superior Court [Wilkinson]*, 181 Ariz. 378,891 P.2d 246, 250 (App.
12 1995) (citations omitted).

13 ***I. A.R.S. §§ 13-4431 and 4433(B)-(E) do not violate Defendant's Sixth Amendment or***
14 ***Due Process Rights.***

15 A.R.S. § 13-4431 was enacted to protect a victim from possible harassment at all
16 court proceedings. It is evident this statute was enacted to implement, preserve and protect a
17 victim's right to be "free from intimidation, harassment, or abuse, throughout the criminal
18 justice process." Ariz. Const. art. II, Section 2.1(A)(1). Defendant's claim that the
19 legislature exceeded its scope by enacting A.R.S. 13-4431 is clearly without merit. In cases
20 where the victim and defendant share a family and the victims have requested contact with
21 the defendant, the court is not required to physically separate a family and will typically
22 address the situation on a case by case basis.

23 As to A.R.S. § 13-4433(B)-(E), it is well established that a victim is not compelled to
24 submit to a pre-trial interview and Arizona courts have repeatedly found that this was not a
25 denial of a defendant's constitutional or due process rights. *See Lincoln v. Holt*, 215 Ariz.
26 21, 156 P.3d 438 (App. 2007) (the legislature did not exceed its authority by enacting statutes
which allows a minor victim's parent who exercises victims' rights on behalf of the child to
exercise all the victims' rights specified in A.R.S. § 13-4433 on the parent's own behalf);

1 *State v. Roscoe*, 185 Ariz. 68, 912 P.2d 1297 (1996) (all victims, including peace officers
2 who became victims while acting in the scope of their official duties, have the right to refuse
3 a pre-trial interview) Defendant's position that the prosecutor is the decision-maker and
4 gate-keeper regarding any and all contact between the defense and a victim is not supported
5 by Arizona law.

6
7 When a victim has asserted their rights, the only absolute statutory limitation between
8 the victim and the defense is that first contact must be initiated through the prosecutor's
9 office. A.R.S. § 13-4433(B). In cases where a victim consents to an interview and agrees to
10 contact with the defense, the remainder of the decisions regarding the contact is at the sole
11 discretion of the *victim*, not the prosecutor. For example, pursuant to A.R.S. § 13-4433(D), if
12 a victim consents to a defense interview, the victim chooses the time and place of the
13 interview and the prosecutor is only allowed to intervene at the request of the victim. In fact,
14 A.R.S. § 13-4433(E) allows a victim to proceed with an interview without the presence of the
15 prosecutor or an agent from the prosecutor's office. Only when a victim asserts their rights
16 does the prosecutor becomes a point of contact for the defense.

17
18 ***II. Neither Katie nor Charlotte DeMocker was required to waive their victims'***
19 ***rights in order to have contact with their father.***

20 Pursuant to A.R.S. § 13-4402(A), "the rights and duties that are established by [the
21 victims' right statutes] arise upon the arrest or formal charging of the person or persons who
22 are alleged to be responsible for a criminal offense against the victim." When, as in this case,
23 the victim of a crime "is killed or incapacitated, the person's spouse, parent, child,
24 grandparent or sibling" is automatically granted victim status. A.R.S. § 13-4401(19).
25 Contrary to Defendant's assertion, the County Attorney's Office's did nothing to
26 purposefully designate the victim's daughters as victims.

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1 Contact between a victim and a defendant is not solely dependent upon whether a
2 victim chooses to assert their victims' right. An order barring a defendant from contacting a
3 victim is a standard condition of release in victim cases; however, as is often the case in
4 domestic violence or child abuse/neglect cases without serious injury, a defendant and/or a
5 victim may petition the court to modify conditions of release to allow communication and
6 contact between a defendant and the victim. This procedure is common where all parties
7 continue to live in the same household after the arrest specifically when the defendant is
8 released from custody.

10 Defendant was arrested on October 23, 2008. At his initial appearance on October
11 24, 2008, the Prescott Justice Court ordered that Defendant be held without bond and to have
12 no contact with Ruth Kennedy, the victim's mother, or Charlotte or Katie DeMocker, the
13 victim's and Defendant's daughters. On October 29, 2008, Charlotte DeMocker informed
14 Victim Services that she would not assert her victims' rights in order to have contact with her
15 father. Charlotte was told she need not waive her right in order to have contact and that
16 requesting contact with Defendant and waiving her victims' rights were not inextricably
17 linked. Charlotte reiterated she did not want to assert her victims' rights. On October 30,
18 2008, Katie DeMocker sent an email to Victim Services stating that she too was opting out.

20 On October 31, 2008, Defendant requested that the conditions of release be modified
21 to allow contact with his daughters. The request was granted by Court Order on November
22 17, 2008. The two-week delay in the decision was due to judicial reassignment after
23 Defendant, and then the State, noticed the assigned judge. Clearly, the daughters were not
24 required to waive their victims' rights in order to have contact with their father and, more
25

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1 importantly, *the waiver of their victims' rights did not override the court order prohibiting*
2 *contact between them*. Only the Court had the authority to modify conditions of release.

3 **CONCLUSION:**

4 Defendant has failed to demonstrate how the legislature exceeded its authority in
5 enacting A.R.S. §§ 13-4431 or 13-4433(B)-(E) or that these statutes and *Ariz. R. Crim. P.*, Rule
6 39(b)(11) interfere with his Sixth Amendment of Due Process Rights. Defendant's motion to
7 declare these statutes and *Ariz. R. Crim. P.*, Rule 39(b)(11) unconstitutional must fail.
8

9
10 RESPECTFULLY SUBMITTED this 5th November, 2009.

11
12 Sheila Sullivan Polk
13 YAVAPAI COUNTY ATTORNEY

14
15 By: 

16 Joseph C. Butner
17 Deputy County Attorney
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COPIES of the foregoing delivered this
5th day of November, 2009 to:

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